APPENDIX "A".

Opinion of the United States District Court for the Northern District of Illinois, Eastern Division.

FRANK PAPE, *Plaintiff*,

vs.

TIME, INCORPORATED, *Defendant*.

No. 61 C 2202.

THE HONORABLE EDWIN A. ROBSON, *District Judge*.

The defendant has moved for a directed verdict at the close of all the evidence. For the reasons set forth below, this court is of the opinion that the motion should be granted.

The plaintiff, Frank Pape, is suing Time, Incorporated for libel allegedly arising out of an article published November 24, 1961, which described the search of James Monroe's apartment on the west side of Chicago and Monroe's subsequent arrest by the plaintiff and seven fellow police officers. The plaintiff is a "public official," *Pape* v. *Time, Incorporated*, 354 F. 2d 558, 560 (7th Cir. 1965), and in order for such a public official to recover a libel judgment against the present defendant, he must prove "with convincing clarity" that the article was false and was pub-

lished with actual malice. *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 285-286 (1964); *Garrison* v. *Louisiana*, 379 U. S. 64 (1964); *St. Amant* v. *Thompson*, 390 U. S. 727 (1968). "Actual malice" has been defined as false statements published with knowledge that they are false, or with reckless disregard as to their truth or falsity. *New York Times* v. *Sullivan, supra.* "Reckless disregard" may be shown to exist where there exists "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant, supra*, at 731. In addition, "recklessness may be found where there are obvious reasons to doubt the accuracy of [an] informant or the accuracy of his reports." Id., at 732. In order to preserve First Amendment rights, it is clear that "some erroneous publications [must be protected] as well as true ones." In determining whether actual malice exists, the writer's personal belief that his story is true is important, but is only one factor to consider. Id., at 732.

In the article complained of in this case, the defendant's writer, Edward F. Magnuson, a veteran reporter, purported to quote part of the publication, Justice, which was compiled by the members and staff of the United States Civil Rights Commission. The portion of the article complained of is as follows:

> "Shifting to the North, the report cites Chicago police treatment of Negro James Monroe and his family, who were awakened in their West Side apartment at 5:45 a.m. by 13 police officers, ostensibly investigating a murder. The police, says Justice, 'broke through two doors, woke the Monroe couple with flashlights, and forced them to leave their bed and stand naked in the center of the living room. The officers roused the six Monroe children and herded them into the living room. Detective Frank Pape struck Mr. Monroe several times with his flashlight, calling him

"nigger" and "black boy." Another officer pushed Mrs. Monroe. Other officers hit and kicked several of the children and pushed them to the floor. The police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers.' The officers were not punished, although Monroe has carried a suit to the Supreme Court, is still seeking a civil judgment." Time magazine, November 24, 1961, at 16.

This quote omits the words which immediately preceded it. The Justice report states that these were allegations contained in a complaint. This omission, which has been ruled to be at least "negligent" is not enough to sustain the plaintiff's burden of proof (as outlined above), since the standard for actual malice is far stricter than the standard for negligence. *Pape* v. *Time, Incorporated*, 354 F. 2d 558, 560 (7th Cir. 1965). This court, therefore, must look further into the background of this article.

Mr. Magnuson testified that he read the omitted words, but decided not to include them in the article as it appeared in Time magazine. He explained the omission by pointing out that the Civil Rights Commission, appointed by the President, was set up by Congress to report on the problems of minorities, and its members were highly respected individuals. This meant to him, he testified, that if an example was used in the text of the report, it was considered by the Commission to be "substantially" true, no matter how the example was worded. In some of the examples, the words "alleged" or "allegation" were not used; in others, such as the one before this court, those words were used. Although the Justice report did warn that they had made no conclusive determination of the correctness of the statements of the complainants or officers, the report also said that "the allegations appeared substantial enough to justify discussion in this study."

Justice, at 5. This statement modifies the whole report, and thereby makes almost all the examples contained in the report "allegations" of one sort or another, except where (in two cases) convictions had been obtained. Therefore, the appearance of the word "alleges" at the beginning of the section in Justice describing the plaintiff's activities is not of controlling significance. It was undisputed in the record that Mr. Magnuson in personal good faith interpreted the word "alleges" in the light suggested above. Professions of good faith, however, may not be sufficient in certain cases. *St. Amant, supra.* It is vital to describe the research that went into this article.

It has been stipulated between the parties that Mr. Magnuson consulted three sources before he wrote the article: the Justice report itself, a press release issued by the Civil Rights Commission concerning its Justice volume (Defendant's Exhibit [DX] G), and a news article in the New York Times of November 17, 1961 (DX H). All of these, if they mention the Pape incident at all, refer to the fact that the statements were contained in a complaint. After the article was drafted, it was sent to Champ Clark, then editor of the National Affairs Section, who in turn, according to an established procedure, sent it to the defendant's Research Department. The article was checked for factual accuracy by Miss Karen Burger (now Mrs. Karen Booth), whose deposition was read in open court. Her job was to make corrections in consultation with the senior editor and the writer. She testified that she did not call the omission to their attention, since she had determined that the writer had good reasons for the omission and that the quote was factually accurate. In order to make this determination, she rechecked the three sources that Magnuson used, and also consulted the defendant's informational reference library, commonly known as the "morgue," and obtained all the materials relating to Frank

Pape and the case of *Monroe* v. *Pape*, 365 U. S. 167 (1961). Stipulation, ¶¶ 25 and 26; DX I through DX P. In order to determine what information was available to the defendant, it will be necessary to examine some of these documents in more detail.

The article from the New York Post of Monday, February 27, 1961, DX I, purported to be a first person account by James Monroe of the events surrounding his arrest and subsequent release. The article does not state explicitly that Monroe's statements were merely allegations in a complaint, and the facts related by Monroe follow substantially the account given by Magnuson in the accused article. However, it should be noted that in the introductory paragraphs, the Post said that the narrative which followed was in Monroe's own words and was his "recollection of what happened." The introduction also points out that the Supreme Court has only allowed Monroe to "sue 13 white policemen for abusing him and his family," and that, impliedly, the actual facts might not be as described in the narrative.

The New York Times article (DX P) of February 21, 1961, sounds a similar cautionary note. It said that "[a] Chicago Negro handyman, James Monroe, brought the case after thirteen city policemen broke into his apartment early one morning. He said that they hit him, made him and his wife stand naked while they searched the apartment without a warrant, then held him illegally in jail before finally releasing him without charges." (Emphasis added.) The reference to the fact that a case was brought, and that Monroe "said" that he had been abused highlight the apparent lack of certainty which the New York Times evidenced. Exhibit L also emphasized the fact that Monroe only "claimed" that certain facts were true, and this exhibit was a dispatch from Time's Chicago Bureau correspondent, Dudley Doust. Doust filed another report, one

day later than Exhibit L, in which he did not mention that Monroe was only "claiming" that the incidents occurred (DX J). The account in this exhibit did support the statements as made in the accused article. The other articles refer to the decision in *Monroe* v. *Pape*, *supra*, and do not otherwise discuss the facts, or, they refer to the plaintiff as being an "ungodly tough," but much-decorated police officer. DX K, DX M and DX N.

The Seventh Circuit Court of Appeals, albeit before the *St. Amant* decision, *supra*, had determined that the defendant, when it reworded parts of the Justice report, took the risk that it "might go too far," and indicated that a jury, on the facts before it, could decide that the defendant's acts were "reckless." *Pape* v. *Time, Incorporated*, 318 F. 2d 652, 655 (7th Cir. 1963), as quoted in *Pape* v. *Time, Incorporated*, 354 F. 2d 558, 560 (7th Cir. 1965). However, the court did not have the complete record before it, as is presently the situation before this court.

Even though the defendant showed at trial that the Monroes recovered an $8,000 judgment against the plaintiff for violating their civil rights, this court assumes for the purpose of argument, that the plaintiff has established, through the eight police officers' testimony, that the statements in the article were substantially false. Even assuming his, the plaintiff has the burden of proving "with convincing clarity" that the article was published with actual malice. The statements set forth in the article were only allowed to be published after other articles and dispatches were consulted and a good faith determination made by the writer and the researcher that the Commission had included the quoted portions with the intention that the facts be taken as "substantially" true. This case is far easier than the *New York Times* v. *Sullivan* case, *supra*, where there was no investigation whatsoever into the truth of falsity of the advertisement's representations.

This case also does not fall within the St. Amant description of what kinds of publications fell outside the protections of the First Amendment. There the court said, at 732:

> "The defendant in a defamation action brought by a public official cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation." (Emphasis added.)

This decision, after the cases in the Seventh Circuit, indicates that where good faith can be shown, as here, and there has been no "fabrication," etc., the First Amendment demands that judgment be rendered for the defendant publisher. Further emphasizing this conclusion is the possibility that if this case goes to the jury, that this would have a "chilling effect" on the exercise of First Amendment rights and might compel a degree of self-censorship because of the reluctance on the part of a publisher to enter into expensive litigation. *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), as cited in *Time, Incorporated* v. *McLaney*, ... F. 2d ....., No. 25585 (5th Cir. Jan. 3, 1969).

At the close of plaintiff's case, defendant moved for a directed verdict. The court might well have granted this. However, in the exercise of extreme caution and with due regard for the statements made by the Court of Appeals in the other *Pape* cases, *supra*, the court decided to wait

until all of the evidence was in and a complete record was made. At the conclusion of the introduction of all the evidence, any lingering doubt that the court may have had was completely eliminated.

It is therefore ordered that the defendant's motion for a directed verdict at the close of all the evidence be, and it is hereby granted.

It is further ordered that judgment be and it is hereby rendered for the defendant on the issue of liability, and the cause is hereby dismissed without costs.

/s/ EDWIN A. ROBSON,
Judge.

January 16, 1969.

APPENDIX "B".

First Opinion of the Seventh Circuit.

FRANK PAPE, *Plaintiff-Appellant,*

v.

TIME, INCORPORATED, *Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 25, 1963

Before SCHNACKENBERG, KNOCH, and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* This is a diversity libel suit charging that Time, Incorporated, publisher of a national weekly news magazine, defamed plaintiff Pape in an article based on *Justice,* volume 5 of the 1961 report of the United States Commission on Civil Rights.[1] The District

1. Created by the Civil Rights Act of 1957, 42 U. S. C. § 1975, to study civil rights problems and report to the President and Congress. The Supreme Court described the Commission's statutory duties in *Hannah* v. *Larche,* 363 U. S. 420, at 441 (1960):

> • • • its function is purely investigative and fact-finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does

(Footnote continued on next page.)

Court dismissed the complaint on Time's motion, and plaintiff has appealed.

Time's motion admitted, for purposes of this appeal, the well pleaded facts: Plaintiff, at the time of the alleged libel, was Director of Security for Chicago Thoroughbred Enterprises, Incorporated, which operated race tracks in metropolitan Chicago. He was on leave from his position as a captain of Chicago Police. He enjoyed a good reputation.

In its issue of November 24, 1961, Time published the alleged defamatory matter in reporting the filing of *Justice* by the Commission. The material subject of suit appears under "Part VII. Equal Justice Under Law." In Part VII are two chapters: "1. Introduction; and 2. Unlawful Police Violence."

Chapter 2, "Unlawful Police Violence," briefly describes eleven typical cases of police brutality. The Commission states: "The allegations of misconduct are supported in several cases by criminal convictions * * * or findings by impartial agencies; in others, by sworn testimony, affidavits from eye witnesses, or by staff field investigations. In no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements. This is the function of a court. The Commission is of the opinion, however, that the allegations appeared substantial enough to justify discussion in the study."[2]

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not make determinations depriving anyone of his life, liberty or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action.

2. 5 U. S. Comm. on Civil Rights Report 5 (1961).

The Time article, captioned "Civil Rights—Dawdling on the Corner,"[3] was based on that part of Chapter 2 of the Commission Report entitled "Patterns of Police Brutality." Time noted the publishing of *Justice* by the Commission and went on to report incidents in Georgia and Chicago, two of the eleven incidents revealed in the Commission Report. The Chicago incident involved the arrest by Pape and other Chicago police officers of a Negro family named Monroe on Chicago's west side.[4]

This District Court's opinion, sustaining Time's motion to dismiss, was that the article was a fair and accurate account of the Commission's Report, a matter of public interest and legitimate subject of comment of an honest purpose; and that the article did not exceed the bounds of fair comment and was not actionable.

The question is whether the District Court erred in finding, under Illinois law, that the complaint failed to state a claim upon which relief could be granted. The subordinate, vital question is whether Time's report of what the Commission said about the Pape incident is fair comment.

Time's article introduced the reader to *Justice* as carry-

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3. The caption "dawdling on the corner" is taken from a separate statement filed in the Report by Reverend Theodore M. Herburgh, C. S. C., President of the University of Notre Dame, and a Member of the Commission. In part, Commissioner Hesburgh stated:

> Personally, I don't care if the United States gets the first man on the moon, if while this is happening on a crash basis, we dawdle along here on our corner of the earth, nursing our prejudices, flouting our magnificent Constitution, ignoring the central moral problem of our times, and appearing hypocrites to all the world.

5 U. S. Comm. on Civil Rights Report 168 (1961).

4. Based on the alleged wrongful conduct of Pape and his fellow officers in making that arrest, Monroe brought a civil rights suit which, on appeal, *Monroe* v. *Pape*, 365 U. S. 167 (1961), was remanded for trial to the Northern District of Illinois, Eastern Division.

ing "a chilling text about police brutality" and that "it stands as a grave indictment, since its facts were carefully investigated by field agents and it was signed by all six of the noted educators who comprise the Commission." The reader is told, in a footnote, who the noted educators are.[5] Time's second paragraph begins, "The bluntly frank report tells of a police officer, referred to only as 'Y', in Dawson, Ga." This and the third paragraphs tell of the Georgia incident through quotations, detailing the police brutality, from the victim, Brazier, and his wife, and quotations from the Report. The third paragraph concludes in Time's statement, "Brizier died five days later, and 'Y' was never punished." In the fourth paragraph Time reported the Pape incident.

The Pape incident is set forth in the Commission Report in this way:[6]

> . . . [O]n October 29, 1958, at 5:45 a.m., thirteen Chicago police officers led by Deputy Chief of Detectives Pape, broke through two doors of the Monroe apart-

5. Members of the United States Commission on Civil Rights: Chairman Dr. John A. Hannah, President of Michigan State University; Vice Chairman Robert G. Storey, head of Southwestern Legal Center and former Dean of Southern Methodist University Law School; Reverend Theodore M. Hesburgh, President of the University of Notre Dame; Dr. Robert S. Rankin, Chairman of the Political Science Department, Duke University; Erwin N. Griswold, Dean of the Harvard University Law School; and Spottswood W. Robinson III, Dean of the Howard University Law School.

6. U. S. Comm. on Civil Rights Report 20, 21 (1961).

> *Search, seizure and violence: Chicago, 1958.*—The Supreme Court of the United States decided the case of *Monroe* v. *Pape* on February 20, 1961. Although this decision did not finally dispose of the case, it did permit the plaintiff to sue several Chicago police officers for violation of the Federal Civil Rights Acts on the basis of a complaint which alleged that:[7]

7. The Commission set forth the facts alleged in the complaint by quoting from Justice Frankfurter's dissent in *Monroe* v. *Pape*, 365 U. S. 167, 202-259 (1961).

ment, woke the Monroe couple with flashlights, and forced them at gunpoint to leave their bed and stand naked in the center of the living room; that the officers roused the six Monroe children and herded them into the living room; that Detective Pape struck Mr. Monroe several times with his flashlight, calling him "nigger" and "black boy"; that another officer pushed Mrs. Monroe; that other officers hit and kicked several of the children and pushed them to the floor; that the police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers; that Mr. Monroe was then taken to the police station and detained on "open" charges for ten hours, during which time he was interrogated about a murder and exhibited in lineups; that he was not brought before a magistrate, although numerous magistrate's courts were accessible; that he was not advised of his procedural rights; that he was not permitted to call his family or an attorney; that he was subsequently released without criminal charges having been filed against him.

Time began its report of the Commission's statement of the Pape incident this way: "Shifting to the North, the report cites Chicago police treatment of Negro James Monroe and his family, who were awakened in their West Side apartment at 5:45 a.m. by 13 police officers, ostensibly investigating a murder." It continued: "The police, says *Justice*, broke through two doors * * *." Time then quoted the rest of the statement of the Commission verbatim. The Time paragraph concludes: "The officers were not punished, although Monroe has carried a suit to the Supreme Court, is still seeking a civil judgment."

We agree with the District Court that Time was not absolutely privileged in writing the article. The absolute privilege of the Commission did not protect Time. It had a "qualified or conditional privilege," *Cresson* v. *Dispatch Printing Co.*, 291 Fed. 632 (D. C. Minn. 1923), to comment

fairly upon, and criticize fairly, the Commission report. Under Illinois law, governing here, Time can be liable if it goes beyond that limit and "states as a fact that which is not true * * *." *Cook* v. *East Shore Newspapers Inc.*, 327 Ill. App. 559, 580, 64 N. E. 2d 751, 761 (1945), *Belt* v. *Tribune Co.*, 6 Ill. App. 2d 489, 128 N. E. 2d 638 (1955). "It is fundamental that fair comment and criticism cannot be predicated on an unfair or false statement of facts." *Belt* v. *Tribune Co.*, 6 Ill. App. 2d 489, at 494, 128 N. E. 2d 638, at 640. The rule applies to writing about crime. *Cook* v. *East Shore Newspapers Inc.*, 327 Ill. App. 559, 585, 64 N. E. 2d 751, 763 (1945).

The test of the fairness of the Time article is the meaning which readers of common and reasonable understanding would ascribe to the language used. *Belt* v. *Tribune Co.*, 6 Ill. App. 2d 489, 493, 128 N. E. 2d 638, 640 (1955). And as Justice John C. Lewe said in *Dilling* v. *Illinois Publishing & Printing Co.*, 340 Ill. App. 303, 306, 91 N. E. 2d 635, 637 (1950), "* * * a person of ordinary intelligence should read a newspaper article * * * with ordinarily intelligent discrimination."

The question before us involves not what the Commission Report of 307 pages says of Pape, but only what the Time article says about the Report. The reader is set by the introduction, conditioned by the Georgia incident and its stark ending, and prepared to read how the Chicago police treated Monroe's family in the very early morning while "ostensibly" investigating a murder. Then the reader is told that *Justice* "says" Pape and others *did* what the Report merely said Monroe's complaint *alleged*. Pape and others had done. The closing paragraph, relied on by Time to immunize it from liability, says the officers were not punished—as the article earlier stated "Y", in the Georgia incident, was not punished.

We conclude that Time took the risk, when it reworded parts of the Commission Report, that it might go to far, *Cook* v. *East Shore Newspapers Inc.*, 327 Ill. App. 559, 580, 582, 64 N. E. 2d 751, 761, 763 (1945), quoting Judge O. W. Holmes, Jr. A jury could find that Time went beyond the limit of fairness here and in doing so was not protected by its privilege of fair comment, and that in making its article more interesting and readable for its audience, it departed from fidelity to the Commission Report. It is our opinion that a jury could read the Time article as stating that the Report said Pape and his fellow officers *did* what the Commission Report merely said the *Monroe* complaint *alleged they did*. The typical newspaper reader could take from the article the impression that Pape and the other officers were not really investigating a murder when they mistreated the Monroe family, that the noted educators in *Justice* found that the Monroes were mistreated by Pape and the other officers, and that they were not being punished but ought to be.

It is true that the Commission had the facts alleged in the *Monroe* complaint, from which it quoted, investigated sufficiently to justify their use for the Commission's purposes in the Report. But the Commission was careful to state, at the beginning of its Report: "In no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements."[8] The Time article, however, does not say that. The article says that the Commission Report "stands as a grave indictment, since its facts were carefully investigated." But the Report does not say that. The "carefully investigated" statement in Time adds weight to its quotation, substituting the words "says *Justice*" for the words of the Report, "• • • a complaint which alleged that ."

Time argues that the "innocent construction" rule re-

8. 5 U. S. Comm. of Civil Rights Report 5 (1961).

quires this court to read the article "innocently," citing *John* v. *Tribune Co.*, 24 Ill. 2d 437, 442, 181 N. E. 2d 105, 108 (1962). We are required by the rule in that case to give the Time article its "natural and obvious meaning." To read the article innocently, Time asks us to read the article as *not* saying what it does say. It says that the Civil Rights Commission said that Pape had, among other things, assaulted the Monroe family and violated their civil rights. In fact, the Commission said that a complaint in a civil action *alleged* that Pape had done these things.

The complaint states a claim upon which relief can be granted. The District Court erred in ordering it dismissed.

The court takes judicial notice that, upon trial of *Monroe* v. *Pape* after remand by the Supreme Court, a verdict and judgment was recently entered for Monroe. After the District Court denied defendants' post-trial motions, except for a reduction of the verdict, Time made a motion in this court to dismiss the appeal for mootness. That motion was taken with the case and is hereby denied.

The judgment is REVERSED, and the cause REMANDED for further proceedings.

SCHNACKENBERG, *Circuit Judge*, dissenting:

The foregoing opinion's importance lies in its alarming invasion of the right of the press to publish its interpretation of the factual situation presented in an official report issued by a commission created by the Congress of the United States. 42 U. S. C. A. § 1975.

From the Commission's report entitled "Justice," it is clear that the Commission had a basis for the statements which it made in its report.[1] It referred, at page 105, to "a comprehensive review of available evidence," while, at page 5, it disclaimed making any conclusive determination

1. Said act required the filing of a report. See § 1975c(b).

as to whether the complaints or the police officers were correct in their statements, this being "a function of a court." But it expressly stated that "allegations of misconduct are supported in several cases by criminal convictions or findings by impartial agencies; in others, by sworn testimony, affidavits from eyewitnesses, or by *staff*[2] fields investigations." That case not having come to trial in court at that time, the Commission, for convenience, expressly quoted the charges of the Monroe complaint as set forth by Mr. Justice Frankfurter in his dissent, 365 U. S. 167, at 203-204.

Justice dealt with numerous other cases where police brutality charges had been made, discussed violence by others than police, considered state and local remedies and the status and rights of the American Indian.

At 112, Justice made recommendations to Congress as to the advisability of remedial legislation. The report was duly transmitted to Congress.

The report known as Justice was privileged and nonactionable in a libel suit. A published article which fairly comments upon a governmental report is likewise privileged and nonactionable, under Illinois law. The publication in the case at bar is a fair comment upon the issuance of a governmental report and its contents. Plaintiff cannot force publishers, under threat of libel, to conceal the fact that the Commission pointed to his alleged conduct as a basis for its conclusions and recommendations to Congress.

I would affirm.

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2. Italics supplied for emphasis. § 1975d (a) provided that there should be a full-time *staff* director for the Commission.

APPENDIX "C".

Second Opinion of the Seventh Circuit.

FRANK PAPE, *Plaintiff-Appellant*,

vs.

TIME, INCORPORATED, *Defendant-Appellee*.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

December 28, 1965

Before DUFFY and SWYGERT, *Circuit Judges*, and GRUBB, *Senior District Judge*.

DUFFY, *Circuit Judge*. Plaintiff Pape brought this suit seeking damages for libel. Jurisdiction was based upon diversity of citizenship. The complaint alleged the defendant, Time, Incorporated, publisher of the national weekly news magazine "Time", had defamed plaintiff in its November 24, 1961 issue. The allegedly libelous story reported the issuance and summarized the contents of the United States Civil Rights Commission's 1961 annual report. This Report entitled "Justice" is in book form. Chapter 2 is devoted largely to a description of alleged police brutality to Negroes.

The Time article entitled "Civil Rights—Dawdling on the Corner", was based largely on Chapter 2 of the Com-

mission's Report entitled "Patterns of Police Brutality." Time reported an incident which it claimed had occurred in Chicago involving brutality by Pape and other police officers while arresting members of a Negro family named Monroe.

In the District Court, defendant moved to dismiss—in effect, urging the complaint failed to state a claim upon which relief could be granted. The District Court granted the motion. On appeal, this Court reversed. *Pape* v. *Time, Incorporated*, 318 F. 2d 652. We stated that the subordinate, vital question was whether Time's story of the Commission's Report of the Pape incident was fair comment.

In our opinion, we pointed out that the question then before us was not what the Commission's Report had said about Pape, but rather, what Time's article had said about the Report. We then noted that Time's article told the reader that the Report stated that Pape and others had actually committed certain acts. In fact, the Report had merely said that these acts were allegations in Monroe's complaint.

We stated "Under Illinois law, governing here, Time can be liable if it goes beyond that limit [fair comment] and states as a fact that which is not true. . . ."

We then said "We conclude that Time took the risk, when it reworded parts of the Commission Report, that it might go too far. . . . A jury could find that Time went beyond the limit of fairness here and in doing so was not protected by its privilege of fair comment, and that in making its article more interesting and readable for its audience, it departed from fidelity to the Commission report."

We decided that the complaint stated a claim upon which relief could be granted, and we reversed and remanded for further proceedings.

Subsequent to remand, the Supreme Court of the United States decided *New York Times Co.* v. *Sullivan*, 376 U. S. 254. Thereafter, defendant took Pape's pretrial deposition. Pape testified he had been in the Chicago police department since 1933 and was presently a captain of police. He admitted that he and police officers under his command had gone to the Monroe house on the evening in question. At that time, he was a deputy chief of detectives for Chicago. He had been appointed to that position by the Commissioner of Police. His permanent rank at that time was lieutenant of police.

In *New York Times*, the Supreme Court stated (376 U. S. p. 283) "We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action,[23] the rule requiring proof of actual malice is applicable."

Footnote 23 referred to, stated in part—"We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. . . ." It is enough for the present case that respondent's position as an elected city commissioner clearly made him a public official. . . ."

Plaintiff urges that the Supreme Court thus confined its holding in *New York Times* to an "elected" public official. Also, that plaintiff was not a "public official" within the meaning of that case because he had neither been elected to his office, nor appointed nor confirmed in his appointment by an elective body.

We do not read *New York Times* v. *Sullivan* as being limited to an elected public official. The Supreme Court based its decision, at least in part, upon certain precedents

involving appointed officials. In one of the cited cases, the libel plaintiff was a Deputy Superintendent of Police for the city of Detroit. *Lawrence* v. *Fox*, 357 Mich. 134, 97 N. W. 2d 719. In another of the cited cases, the plaintiff was the Chief of Police of Los Angeles—*Snively* v. *Record Publishing Company*, 185 Cal. 565, 198 P. 1.

Subsequent decisions to *New York Times* clearly indicate the courts do not understand the rule announced in that case to be confined to elected public officials. In *Henry* v. *Collins*, 380 U. S. 356 (1965), the Supreme Court applied the *New York Times* doctrine to the Chief of Police of Clarksdale, Mississippi. The Chief was an appointed officer.

In *Tucker* v. *Kilgore*, 388 S. W. 2d 112 (Ky. 1965), the Court applied the *New York Times* doctrine to an ordinary police patrolman in the city of Louisville, Kentucky. See also *State* v. *Browne*, 206 A. 2d 591 (N. J. 1965) and *Matassa* v. *Bel*, 164 So. 2d 332 (La. 1964).

We hold that on the date Pape arrested James Monroe, when Pape held the position of deputy chief of detectives and lieutenant of police, he was a public official as that designation was used in *New York Times* v. *Sullivan*.

We turn, therefore, to consider whether the existence of "actual malice" by Time, Incorporated presented a jury question. The Supreme Court in *New York Times* v. *Sullivan*, stated at 376 U. S. 279-280: "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. . . ."

The record before us shows that Time, Incorporated was, at least, negligent in printing as established facts, matters and events which the Commission's Report stated were

mere allegations in a complaint. But, negligence is not enough.

In *New York Times*, the newspaper admitted it had had evidence in its own files affirmatively showing the falseness of numerous statements in the publication . . . 376 U. S. at pages 287-288; also that the Times had accepted and published the advertisement without in any way checking its accuracy against outside sources or material in its files. 376 U. S. 287.

The Supreme Court further said—376 U. S. at pages 287-288—"We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice."

In *Garrison* v. *Louisiana*, 379 U. S. 64, the Supreme Court applied the *New York Times* rule to criminal libel, holding that actual malice must be proved to convict an individual for libeling a public officer. The Court there defined malice as "only those false statements made with the high degree of awareness of their probable falsity. . . ." 379 U. S. 74.

The burden of proving actual malice is upon Pape. He admitted in his pretrial deposition that he did not know anyone at Time, and, in fact, he does not claim the article was published with any deliberate attempt to harm him. He argues, however, that this question is already settled by reason of our decision in *Pape* v. *Time, Incorporated* (1962), 318 F. 2d 652.

Our previous decision was made prior to *New York Times* v. *Sullivan*. There, the District Court had dismissed the complaint on the defendant's motion so that all the well-pleaded facts stood admitted before us. We applied Illinois law.

We must now determine whether there is sufficient show-

ing in the record before us that Time's statements were knowingly false or made with reckless disregard as to whether or not such statements were false.

As stated in our previous decision—". . . Time took the risk when it reworded parts of the Commission's Report that it might go too far. . . ." We noted that Time had departed from fidelity to the Commission's Report in order to make the article more interesting and readable for its audience. Time's writers who prepared the article must have known the statements as to Pape's conduct were only allegations in a complaint in a civil suit. As we put it (318 F. 2d at page 655)—"It is our opinion that a jury could read the Time article as stating that the Report said Pape and his follow [sic] officers *did* what the Commission Report merely said the Monroe complaint *alleged they did.*"

We hold that a sufficient showing has been made so that a jury could find Time, Incorporated acted with reckless disregard as to whether or not the reworded statements, hereinbefore described, were true or false. Therefore, it was error for the District Court to grant defendant's motion for a summary judgment.

The judgment of the District Court is reversed and remanded for further proceedings.

REVERSED AND REMANDED.

APPENDIX "D".

Third Opinion of the Seventh Circuit.

FRANK PAPE, *Plaintiff-Appellant,*

vs.

TIME, INCORPORATED, *Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

December 15, 1969.

Before DUFFY, *Senior Circuit Judge*, KILEY and KERNER, *Circuit Judges.*

DUFFY, *Senior Circuit Judge.* This is a suit for libel brought by plaintiff, a Chicago police officer, against Time, Incorporated, the publisher of Time Magazine. The claim of plaintiff is based upon a story printed in Time Magazine under date of November 24, 1961. This appeal is from an order of the District Court granting, at the close of all of the evidence, a directed verdict in favor of defendant.

Pape became a policeman in March 1933. He was promoted to the position of Deputy Chief of Detectives in 1957. He held this position on October 27, 1958. He was promoted to Captain in 1959. During the period Pape was a sergeant of police, he participated in hundreds of arrests. On November 24, 1961, plaintiff, while on leave of

absence from his police position, was employed as Director of Security for the Chicago Thoroughbred Enterprises, Inc., which company operates several race tracks in the Chicago area.

"Justice", Volume 5 of the official 1961 Report of the United States Commission on Civil Rights, was issued on November 17, 1961. The Report stated: "In no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements."

Under the heading of "Search, seizure, and violence: Chicago, 1958," the Commission's Report stated that ". . . on the basis of a complaint which alleged that: . . ." It thereafter related an alleged occurrence on the part of detective Pape and twelve other police officers during which it claimed that Monroe and members of his family were abused and Monroe was arrested and questioned about a recently committed murder.

This is the third time this case has been before us. In *Pape* v. *Time, Incorporated,* 318 F. 2d 652, 655 (7 Cir., 1963) we reversed the judgment and remanded the case for further proceedings. In that opinion we stated: "We conclude that Time took the risk, when it reworded parts of the Commission Report, that it might go too far, . . . A jury could find that Time went beyond the limit of fairness here and in doing so was not protected by its privilege of fair comment, and that in making its article more interesting and readable for its audience, it departed from fidelity to the Commission Report."

After the remand, the Supreme Court of the United States decided *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964). Thereafter, this case came before us for a second time. Our opinion in that case appears in *Pape* v. *Time, Incorporated,* 354 F. 2d 558 (7 Cir., 1965) (second opinion). We again reversed the judgment of the District

Court and remanded. We held that Pape was a public official as that designation was used in *New York Times Co.* v. *Sullivan, supra.* There is no reason to now reverse that holding. We recognized the doctrine "[T]hat prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. * * *" *Pape* v. *Time, Incorporated, supra,* at page 560.

In the second opinion at 354 F. 2d 560, we quoted from our first opinion as follows: "It is our opinion that a jury could read the Time article as stating that the Report said Pape and his follow (sic) officers *did* what the Commission Report merely said the Monroe complaint *alleged they did'.*" We again reversed the judgment of the District Court and remanded.

The Supreme Court has handed down several opinions explaining the language of the *New York Times Co.* v. *Sullivan, supra,* case. Among the cases which we have carefully considered is *Garrison* v. *Louisiana,* 379 U. S. 64, 74 (1964). The Court there held that recklessness requires a showing of a high degree of awareness of probable falsity. In *Henry* v. *Collins,* 380 U. S. 356, 357 (1965), the Court emphasized its interpretation of an "intent to inflict harm through falsehood." *Beckley Newspapers Corp.* v. *Hanks,* 389 U. S. 81, 84 (1967) and *St. Amant* v. *Thompson,* 390 U. S. 727, 731 (1968).

In our second opinion we stated at 354 F. 2d 560 "Time's writers who prepared the article must have known the statements as to Pape's conduct were only allegations in a complaint in a civil suit." Since that time, the author of the Time article, one Edward F. Magnuson, has so testified. He admits that *when he wrote the article* he

knew the Commission's Report stated that the alleged assaults on Monroe and his family were based upon a complaint which made such allegations. Magnuson was a former police reporter for the Minneapolis Tribune and he testified he knew the meaning of the word "complaint" and of the word "alleged." However, Magnuson deliberately and knowingly failed to mention in his article that his story of the alleged conduct and action of Pape and the other police officers was based on an allegation in a complaint in a pending civil suit.

We are here concerned with Time's falsification of what the Report said rather than the falsification of a story about the Monroe incident. Surely, a deliberate act of omission can show malice as well as an act of commission. Time omitted mention of the fact that when the article was written, the Pape-Monroe incident was reported in "Justice" as allegations in a complaint, not as proven fact. And the alleged injury to Pape was in Time's stating that the Commission reported that incident as true, instead of stating that the Commission reported it as alleged to be true. The jury could conclude that this amounted to an "intent to inflict harm through falsehood." *Garrison* v. *Louisiana*, 389 U. S. 64, 74 (1964); *Henry* v. *Collins*, 380 U. S. 356, 357 (1965).

We think pertinent the recent statement of the Court of Appeals for the Second Circuit in *Goldwater* v. *Ginzberg*, 414 F. 2d 324, 337 (2 Cir., 1969): "One cannot fairly argue his good faith or avoid liability by claiming that he is relying on the reports of another if the latter's statements or observations are altered or taken out of context."

We hold the District Court was again in error in granting defendant's motion for a directed verdict.

The judgment of the District Court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

KILEY, *Circuit Judge*, concurring.

I concur in Judge Duffy's opinion that this case should have gone to the jury.

It is my view that the testimony of Magnuson, referred to in Judge Duffy's opinion, was sufficient prima facie to prove that Time published the article in suit "with knowledge that it was false." The publication of the article with the words in the Commission report deliberately omitted could reasonably be found to be a publication of "a defamatory falsehood . . . with knowledge that it was false." This met the test of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), under which either knowledge of falsity or reckless disregard of whether the material is false or not is required for proof of the vital element of "actual malice." I agreed that the case progeny of *New York Times Co.* v. *Sullivan* has not changed the Supreme Court's test.

The effect of doing to the Commission report what Time did to it was to give the report an additional reader value. The Time article does not contain the various qualifications in the Commission report which Time urges upon us now with respect to the context in which the Commission treated the Monroe-Pape incident. We must consider the Time article as it was published.

APPENDIX "E".

UNITED STATES COURT OF APPEALS.
For the District of Columbia Circuit.

No. 23,267

JACK WASSERMAN, *Appellant*

vs.

TIME, INC.

Appeal from the United States District Court
for the District of Columbia

Decided March 3, 1970

Before FAHY, *Senior Circuit Judge*, and WRIGHT and ROBINSON, *Circuit Judges*.

PER CURIAM: On cross motions in appellant's action for libel in the District Court against appellee Time, Inc., the court granted summary judgment in favor of Time, and dismissed appellant's complaint. He appeals.

Time publishes a weekly magazine with national circulation. In its issue of October 7, 1966, it published a photograph of seven men sitting at a table in a restaurant in Queens, New York. One of the men was appellant, a mem-

ber of the bar of this court in active practice. Another was Frank Ragano, also an attorney. Accompanying the photograph was a brief article which referred to the occasion as a meeting even "bigger than Apalachin' of top Cosa Nostra hoodlums." The article also referred to the occasion as a delayed lunch which had been interrupted by the police because the District Attorney wanted the men before a grand jury on crime in Queens, that a judge had set bail at $100,000 each, that this had been met, and that the grand jury got only grunts.

Ragano sued Time for libel in the United States District Court for the Middle District of Florida.[1] In that case Time moved for summary judgment on the basis of the freedom of press protected by the First Amendment. Judge Krentzman denied the motion. He held that if the statement was understood as defamatory it was not protected by the ruling announced in *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), if the statement was false and made with actual malice, that is, with knowledge of its falsity or in reckless disregard of whether it was true or false. He held as to Mr. Ragano that under these criteria the publication was with actual malice. He accordingly denied Time's motion for summary judgment and held that it was for the jury to determine whether or not the article was in fact understood as defamatory.

We accept the position of Time, as Judge Krentzman did, that the standards of *New York Times* v. *Sullivan*, *supra*, are applicable even though appellant was not a public official, since he was engaged in a matter of public interest and concern.[2] However, as more fully appears in the opinion of Judge Krentzman, it is undisputed that Time knew that Wasserman, like Ragano, was an attorney for one or more

1. *Ragano* v. *Time, Inc.*, 302 F. Supp. 1005 (M. D. Fla. 1969), *appeal docketed*, 5th Cir. 1969.

2. *See* cases cited in *Ragano*, *supra*, 302 F. Supp. at 1006-07, n. 1.

of the men in the group referred to in the article and was not one of those called before the grand jury and released on $100,000 bail. Time's position is that by attending the delayed lunch meeting the attorneys were playing a part and were engaging in a demonstration defiant of the law, which justified Time in its editorial decision reached in good faith not to refer to appellant and Ragano as attorneys, but to place them in the same category as the others characterized in the article as we have set forth. Such a decision on the part of the editors of Time, however, would not preclude responsibility for any defamation known to be false or made with reckless disregard of the truth.

The judgment is reversed and the case is remanded for trial on the issues of actual malice, defamation and possible damages.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

WRIGHT, *Circuit Judge, concurring:* I concur in the court's opinion. My attempt here is to set out what I conceive to be the proper procedure in handling the issue of actual malice in *New York Times Co.* v. *Sullivan*[1] cases.

In my judgment *New York Times Co.* v. *Sullivan* makes actual malice a constitutional issue to be decided in the first instance by the trial judge applying the *Times* test of actual knowledge or reckless disregard of the truth.[2] *Cf. Jackson* v. *Denno*, 378 U. S. 368 (1964). Unless the court finds, on the basis of pretrial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice in the *Times* sense, it should grant summary judgment for the defendant. *Washington Post Co.* v. *Keogh*, 125 U. S.

1. 376 U. S. 254 (1964)

2. *Compare Rosenblatt* v. *Baer*, 383 U. S. 75, 88 (1966): "We remark only that, as is the case with questions of privilege generally [in a libel case], it is for the trial judge in the first instance to determine whether the proofs show respondent to be a 'public official.'"

App. D. C. 32, 365 F. 2d 965 (1966), *cert. denied*, 385 U. S. 1011 (1967). *Compare Goldwater* v. *Ginzburg*, 2 Cir., 414 F. 2d 324, 336-337 (1969), *cert. denied*, ... U. S. ....., 38 U. S. L. WEEK 3279 (January 26, 1970).

If the case survives the defendant's summary judgment motion, the trial court at the close of the plaintiff's case must decide whether actual malice has been shown with "convincing clarity."[3] In making this judgment the court will judge the credibility of the witnesses and draw its own inferences from the evidence. If the trial is permitted to proceed, the court will be called upon again to make a judgment on the actual malice issue at the close of all of the evidence. If the motion for a directed verdict at this stage of the trial is denied, the actual malice issue, along with the other issues, is then submitted to the jury under the *Times* instruction without any indication from the court or counsel that the court has decided that the evidence shows actual malice with "convincing clarity."

This two-step procedure in which both the trial judge and the jury must find actual malice before there can be judgment for the plaintiff provides the protection of the First Amendment freedom that *Times* sought to make secure in areas of public concern. As the Court stated in *Rosenblatt* v. *Baer* in support of its requirement that the trial judge in the first instance determine whether the evidence shows the plaintiff in a libel suit to be a public official: "Such a course will both lessen the possibility that a jury will use the cloak of a general verdict to punish unpopular ideas or speakers, and assure an appellate court the record and findings required for review of constitutional decisions. Cf. *Speiser* v. *Randall*, 357 U. S. 513, 525; *New York Times*, 376 U. S., at 285." 383 U. S. at 88 n. 15.

I am authorized to say that Judge Robinson concurs in this opinion.

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3. *New York Times Co.* v. *Sullivan*, *supra* Note 1, 376 U. S. at 285-286.